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Supreme Court, U.S.
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No. 03-1240

IN THE

Supreme Court of the United States

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK,

Petitioners,

v.

ROGER ERVAST,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does ERISA "completely preempt" a state-law based tort claim that majority shareholders breached a fiduciary duty to provide material information to a minority shareholder simply because the minority shareholder acquired his stock ownership interest through an ERISA plan?

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INTRODUCTION

In this case, the United States Court of Appeals for the Eleventh Circuit, applying the "complete preemption" test of *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987), held that ERISA does not "completely preempt" a state-law claim that a majority shareholder breached a fiduciary duty to a minority shareholder by concealing material information about a planned merger, with the result that the minority shareholder disposed of his holdings for far less than the real value of the shares. Petitioners identify no other decision of a court of appeals that has decided this question, let alone reached a contrary holding on it. And they acknowledge that the Eleventh Circuit's decision is consistent with that of the only other court of appeals that has addressed the application of the complete preemption doctrine to a similar claim. *See Husvar v. Rapoport*, 337 F.3d 603 (6th Cir. 2003). Because the extremely fact-specific issue presented has so far arisen in only one federal appellate decision and is not the subject of any disagreement among the circuits, there is no need for this Court to reach out to address it.

Petitioners nonetheless argue that the case presents a variety of doctrinal conflicts among the circuits. But most of the supposed "conflicts" involve issues that were either not raised in or not actually decided by the court below, and the rest amount at most to abstract and insubstantial differences in the way different circuits have worded their opinions. None of these supposed "conflicts" merits a grant of certiorari, particularly insofar as they involve issues that were not considered below and are not dispositive of this case.

Finally, to the extent that there may have been any need for guidance to the lower courts on the scope of the "complete preemption" doctrine, this Court has recently provided it in its decision in *Aetna Health Inc. v. Davila*, No. 02-1845 (U.S. June 21, 2004). Even if there were minor variations in the ways different circuits had articulated their abstract "tests" for complete preemption under ERISA before *Davila*,

there is no need to grant certiorari now in light of the additional guidance *Davila* provides. Nor is there any need to vacate the judgment below and remand this case for further consideration in light of *Davila*'s holding that claims that require interpretation of the terms of an ERISA plan and that are premised on legal duties derived from the defendants' roles with respect to an ERISA plan are completely preempted. That holding does not in any way call into question the correctness of the Eleventh Circuit's holding that the very different claims at issue in this factbound case are not completely preempted because, among other things, they do not seek to enforce or interpret the terms of an ERISA plan and are premised on legal duties that exist independently of an ERISA plan. Indeed, *Davila* confirms that the way the Eleventh Circuit analyzed the complete preemption issue was correct.

STATEMENT OF THE CASE

Until October 1999, respondent Roger Ervast was an employee of petitioner Flexible Products Company. Although Flexible's stock was not publicly traded, employees could acquire ownership interests in Flexible stock under an employee stock ownership plan, through which shares were held in trust for their benefit. When an employee left the company, he would receive a distribution reflecting the value of the shares held in trust for him. The valuation date depended on the date the departing employee exercised a "put" option for his shares.

Over the course of his employment with Flexible, Mr. Ervast accumulated holdings of Flexible stock worth several hundred thousand dollars under the employee stock ownership plan. On October 4, 1999, Mr. Ervast submitted two weeks' notice of his resignation from Flexible. Flexible responded by terminating him immediately. Mr. Ervast then exercised his "put option" and received payment for his shares in the second week of October.

Meanwhile, unbeknownst to Mr. Ervast, Flexible and its management had begun negotiations aimed at selling the company to Dow Chemical Company. By early October, negotiations had reached an advanced stage, and a price was agreed upon by October 26. The merger was consummated in January 2000. As a result of the merger, all Flexible employees who had exercised put options under the employee stock ownership plan after October 26, 1999, received a higher price for their stock based on the price paid by Dow. At no time before Mr. Ervast exercised his put option was he given any information about the proposed merger, and, as a result, he cashed in his holdings at a time when the amount he realized was substantially lower than it would have been had he known what was known by the insiders — namely, that there were material developments affecting the value of his stock.[1]

In January 2001, Mr. Ervast filed suit against Flexible and two individual defendants in a Georgia state court, alleging that the defendants had breached fiduciary duties they owed him as a minority shareholder under state law by failing to disclose material information affecting the timing of his decision to liquidate his stock holdings. The defendants removed the action to the United States District Court for the Northern District of Georgia, claiming that the case arose under federal law because Mr. Ervast's state-law claims were completely preempted by remedies available under ERISA § 502(a). Agreeing with the defendants, the district court denied Mr. Ervast's motion to remand, and later entered summary judgment against Mr. Ervast.

Mr. Ervast appealed, and the Eleventh Circuit reversed. The court recognized that under this Court's decision in *Metropolitan Life*, a claim invoking state law is subject to "complete preemption" and thus deemed to arise under federal law

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[1] On October 1, 1999, two insiders renegotiated their compensation to call for significant payouts upon a change in control of Flexible.

if it seeks relief that "falls within the scope of" ERISA § 502(a). In that instance, the court acknowledged, "a plaintiff's state law claims filed in state court are 'necessarily federal in character' and removable based on federal question jurisdiction." *Ervast v. Flexible Products Co.*, 346 F.3d 1007, 1012 (11th Cir. 2003).

At the same time, the court pointed out that not every case involving the existence of an ERISA plan is "automatically subject ... to federal question jurisdiction." 346 F.3d at 1014. Rather, a claim is completely preempted when it involves an ERISA plan, a proper ERISA plaintiff, an ERISA entity as a defendant, and seeks relief "akin to that available" under ERISA § 502(a). *Id.* at 1013. Here, the court concluded, Mr. Ervast's claims were not akin to claims under § 502(a) because they did not seek to recover benefits due under the plan, to enforce any other rights under the plan, or to clarify rights to future benefits under the plan (*id.* at 1014), nor were the claims based upon fiduciary duties that existed by virtue of the plaintiff's and defendants' relationship to a plan. *Id.* at 1016. Rather, as the court put it, Mr. Ervast "claims a right to information that, if he possessed [it], would have changed his decision making process with regard to the time he sought to collect his benefits. Ervast also does not claim entitlement to this information under the terms of the ESOP; rather, his claim is based on his status as minority shareholder and the duty owed him by the majority shareholders." *Id.* at 1015.

Thus, the court concluded, "[w]e are not confronted with an 'artful pleader' that has found a way around ERISA preemption by couching the terms of his claim for benefits in a creative way." *Id.* at 1016. Mr. Ervast, instead, was making a claim that was in essence a claim under Georgia principles of corporate law, not an "ERISA civil action for the recovery of benefits." *Id.* at 1017. Hence the claim was not subject to complete preemption; did not arise under federal law; and was not removable. Accordingly, the court reversed and re-

manded to the district court with instructions to grant Mr. Ervast's motion to remand the action to the Georgia state court where it was originally filed.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among the Circuits Over Whether ERISA "Completely Preempts" State-Law Claims That a Majority Shareholder Violated a Fiduciary Duty to a Minority Shareholder by Concealing Information Material to the Minority Shareholder's Decision to Dispose of His Shares.

The Eleventh Circuit's decision in this case addressed the application of complete preemption under ERISA to a narrow and extremely fact-specific set of circumstances. Respondent Roger Ervast invoked Georgia tort law in a Georgia state court, seeking recovery for a breach of fiduciary duty that resulted in his disposition of his stock holdings in Flexible for a value lower than he would have realized had he been properly informed of Flexible's planned merger. The sole issue decided by the Eleventh Circuit was whether this specific claim was removable on the theory that, although framed as a state-law claim, it actually arose under federal law because ERISA completely preempts and supplants all state-law claims for such relief.

Acknowledging this Court's holding in *Metropolitan Life* that claims that are "within the scope of § 502(a)" of ERISA are completely preempted, 481 U.S. at 64, the Eleventh Circuit held that Mr. Ervast's claim was not subject to complete preemption because it was not "within the scope of § 502(a)." The court concluded that Mr. Ervast "did not seek 'compensatory relief akin to that under'" § 502, 346 F.3d at 1014, because, among other things, his claim was not one for benefits due under an ERISA plan, did not depend on the construction or enforcement of the terms of an ERISA plan, and did not seek to enforce duties premised on the existence of a plan or on the defendants' roles in relation to a plan. *Id.*

at 1014-16. Observing that the mere "presence of an ERISA plan within the facts of a case does not, on its own, automatically subject the litigant to federal question jurisdiction," *id.* at 1014, the court held that the complete lack of congruence between Mr. Ervast's claim and a claim under ERISA § 502(a) precluded any finding the Mr. Ervast was actually asserting a civil action under ERISA. *Id.* at 1017. Hence there was no complete preemption and no federal jurisdiction.

The Eleventh Circuit's factbound application of *Metropolitan Life* to the particular allegations of Mr. Ervast's complaint does not conflict with the holding of any other federal court of appeals. Indeed, petitioners do not even contend that there is a conflict over complete preemption of such claims of breach of duty by majority or controlling shareholders, *and they identify no other federal appellate cases that even address this specific issue.*

Moreover, by petitioners' own account, the opinion in the one other federal appellate case that comes the closest to addressing the narrow issue presented here, *Husvar v. Rapoport*, 337 F.3d 603 (6th Cir. 2003), is fully consistent with the holding of the Eleventh Circuit in this case. In *Husvar*, plaintiffs who were minority shareholders by virtue of an employee stock ownership plan covered by ERISA claimed that the defendants (who were majority or controlling shareholders) had breached state-law fiduciary duties by mismanaging the corporation while at the same time paying themselves sizeable bonuses, resulting in the destruction of the value of the minority shareholders' stock. The defendants removed the case, arguing that the claims were completely preempted by ERISA.

The Sixth Circuit in *Husvar*, like the Eleventh Circuit in this case, held that such a claim of breach of fiduciary duty was not within the scope of ERISA § 502 under the reasoning of *Metropolitan Life* because the "real nature" of the claim was not federal. The court noted that the plaintiffs were

not seeking to enforce fiduciary duties that arose because of the existence of an ERISA plan, nor were they seeking to enforce the terms of the plan or recover benefits under it. Like the Eleventh Circuit, the Sixth Circuit held that the mere fact that the value of shares acquired through an ERISA plan was at issue "does not transform a state-law breach of fiduciary duty claim into a federal ERISA action." 337 F.3d at 608. Thus, the court concluded, the plaintiffs' "filing contains no claims arising under federal law," *id.* at 609, and was not removable.

Oddly, petitioners invoke the Sixth Circuit's ruling in *Husvar* as a reason this Court should grant certiorari, even though they acknowledge that it did not address the same issue and that its reasoning is fully consistent with that of the Eleventh Circuit to the extent the issues in the two cases are similar. Pet. 6. But consistency among rulings of the federal appellate courts is a strong reason for *denying* certiorari, not granting it.

Moreover, although not cited by petitioners, the Ninth Circuit's decision in *Abraham v. Norcal Waste Systems,* 265 F.3d 811 (9th Cir. 2001), also addressed similar issues of breaches of corporate duties affecting the value of shares held under an employee stock ownership plan, and similarly held that the plaintiffs' claims were not completely preempted "because those claims are based upon rights that arise under state law in their capacity as former shareholders ... and current note holders ..., not upon any rights that are conferred, enforced, or governed by ERISA (nor upon a violation of the terms of a plan)." *Id.* at 824. *Abraham* further illustrates the absence of any relevant disagreement among the circuits over the issue presented here.

In addition, petitioners' inability to identify any other federal appellate cases that actually decided the precise issue in this case, and their identification of only one other decision that is even similar, weighs strongly against their assertion that the question presented is important enough to merit

a grant of certiorari. That the issue has so far reached only one court of appeals hardly suggests that it will recur so often that this Court's immediate guidance on it is necessary. Should the issue arise more frequently in the future, and should it generate some actual disagreement among the circuits, there will be ample time for this Court to address it. Until then, the Court should commit its scarce resources elsewhere.

II. The Supposed Doctrinal Conflicts on Which Petitioners Rely Either Do Not Exist or Are Not Presented by This Case.

Unable to identify a genuine split of authority on the question actually presented, petitioners assert that this case presents a number of abstract doctrinal conflicts over the standard for complete preemption under ERISA. Petitioners adopt a kitchen-sink approach, identifying as many issues as they can where some question regarding complete preemption is unresolved or where courts have used different words in articulating some aspect of the complete preemption doctrine, and then asserting that this case presents those issues, regardless of whether petitioners bothered to raise them below. In every case, however, either there is no genuine conflict among the circuits, or no holding in the court below on the issue, or — in most instances — both.

A. There Is No Relevant Split Among the Circuits Over the General Standard for Complete Preemption.

Petitioners begin at the most abstract level, asserting that the Eleventh Circuit's overall standard for complete preemption under ERISA, which was articulated in *Butero v. Royal Maccabees Life Insurance Co.*, 174 F.3d 1207 (11th Cir. 1999), and applied by the court to Mr. Ervast's claims, conflicts with the standards applied by other circuits. Pet. 8-9. As petitioners summarize the Eleventh Circuit standard, it involves an inquiry into whether (1) there is a relevant ERISA plan, (2) there is a plaintiff who has standing to sue under

ERISA, (3) there is a defendant that is an ERISA entity, and (4) the plaintiff seeks relief that is "akin to" that available under ERISA § 502(a).

Petitioners acknowledge that the Eleventh Circuit's standard is similar to that devised by the Seventh Circuit in *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1487 (7th Cir. 1996), but assert that both the standard applied below and the standard set forth in *Jass* conflict in principle with the more "straightforward" approach of other circuits, which turns on whether a state-law claim is "an alternative means of vindicating the rights protected by § 502(a)." Pet. 9-10. Petitioners cite *Cicio v. Does*, 321 F.3d 83, 94 (2d Cir. 2003), *pet. for cert. pending sub nom. Vytra Healthcare v. Cicio*, No. 03-69, as exemplifying their preferred approach.[2]

Petitioners, however, are in no position to challenge the Eleventh Circuit's *Butero* standard in this Court because they never asserted in the court below that the standard was incorrect. Rather, in their principal brief on the merits, they endorsed the *Butero* standard and argued only that Mr. Ervast's claims were preempted under it. App. Br. 12. Even if their failure to raise the point before the panel could be excused on the theory that *Butero* was controlling, petitioners were at least obliged to raise the issue when they sought rehearing en banc. But not even in their rehearing petition did they assert that the *Butero* standard improperly interpreted *Metropolitan Life* or conflicted with precedents of other circuits; rather, they endorsed *Butero* as supplying the "correct inquiry" and argued that the panel opinion was inconsistent with *Butero*. Pet. for Reh. and Reh. En Banc 3-4, 7. Of course, "[w]here

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[2] Petitioners also note that the circuits were in disagreement over whether a showing of conflict preemption under ERISA § 514 is a necessary part of the "complete preemption" test. Pet. 10 n.4. This Court's decision in *Davila*, however, resolves this conflict by clarifying (consistent with the Eleventh Circuit's ruling below) that complete preemption under § 502(a) does not require § 514(a) preemption. *Davila*, slip op. at 12 n.4.

issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001). Having failed to afford the Eleventh Circuit the chance to consider their broad-brush claim that the *Butero* standard is improper, petitioners cannot raise it now.

In any event, petitioners' assertion that the Eleventh Circuit's *Butero* standard conflicts with the Second Circuit's formulation of the complete preemption doctrine in *Cicio* is thoroughly unpersuasive. *Cicio*'s inquiry into whether a state claim seeks to "vindicate rights already protected by § 502(a)" (321 F.3d at 94) is, at least in the abstract, not meaningfully different from (and certainly not appreciably broader than) the Eleventh Circuit's inquiry into whether the state claim is "akin to" a claim under § 502(a). Both inquiries turn to a significant degree on whether the claim seeks recovery of benefits due under the plan, enforcement of rights under the plan, or clarification of entitlement to future benefits under the plan. *Compare Cicio,* 321 F.3d at 94, *with Ervast*, 346 F.3d at 1014. On the broad level of generality at which petitioners present the issue, there is no genuine conflict.

To be sure, the Second Circuit in *Cicio* did apply its test to reach a *result* apparently at odds with the result reached by the Seventh Circuit in *Jass*.[3] But any conflict between the Second and Seventh Circuits on the application of the general standard to the specific issues presented in *Cicio* and *Jass*

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[3] Ironically, and further evincing the fundamentally misguided nature of their petition for certiorari, petitioners claim to prefer the Second Circuit's standard over the Seventh Circuit's even though the Second Circuit found *no* complete preemption in *Cicio* while the Seventh Circuit found a similar claim completely preempted in *Jass*. This anomaly underscores that the general formulations on which petitioners focus their attention are less significant than the application of the tests to concrete facts.

hardly calls for a grant of certiorari *here*. The issue in *Cicio* and *Jass* — whether claims challenging medical coverage decisions are preempted — is completely different from the issue here. That the Second and Seventh Circuits disagreed over complete preemption of those claims in no way suggests that either of those circuits would disagree with the Eleventh Circuit over whether the very different claim at issue here is completely preempted. In any event, the medical coverage issue has just been resolved by this Court in *Davila*, so any disagreement between *Jass* and *Cicio* now appears moot.

B. The Eleventh Circuit Did Not Limit Complete Preemption Solely to Claims Expressly Based on the Terms of an ERISA Plan.

At a slightly lower level of generality, petitioners contend that the Eleventh Circuit in this case limited complete preemption to claims that are expressly based on the terms of an ERISA plan, in conflict with decisions of other courts of appeals. In fact, however, the Eleventh Circuit did no such thing, and its decision does not conflict in any way with the decisions petitioners cite.

Although petitioners contend that the linchpin of the Eleventh Circuit's opinion was that Mr. Ervast's claims were not based on the terms of the plan (Pet. 11), the opinion nowhere states that complete preemption always and in all circumstances depends on whether a claim seeks to enforce or requires interpretation of the terms of a plan. Rather, the opinion says that a claim that seeks "relief akin to that available under" § 502(a) will "often" — not always — be "a claim for benefits due under a plan." 346 F.3d at 1013. Consistently with other federal appellate opinions, including those cited by petitioners, the Eleventh Circuit considered whether the claims were dependent on the terms of the plan as an important factor, but not the exclusive factor, in determining whether the claims were completely preempted. In this respect, the Eleventh Circuit's approach anticipated that of this Court in *Davila*, where it was critical to the Court's

finding of complete preemption that "interpretation of the terms of respondents' benefit plans forms an essential part of their [state-law] claim ...." *Davila*, slip op. at 11.

Here, the Eleventh Circuit focused primarily on whether Mr. Ervast's complaint sought relief due under the plan *not* because it thought that was the *sine qua non* for complete preemption, but because that had been "what the district court construed Ervast's state law claim to be seeking." 346 F.3d at 1015. Significantly, however, the court also considered whether the claims were completely preempted because they invoked ERISA fiduciary duties, and concluded that they did not — an inquiry that would be unnecessary if, as petitioners contend, the court had held that only claims seeking to enforce the express terms of the plan were preempted. *See* 346 F.3d at 1016.[4]

Petitioners do not help their case by citing decisions holding that claims of retaliatory discharge based on the exercise of ERISA rights are completely preempted (*see, e.g., Wood v. Prudential Ins. Co.*, 207 F.3d 674, 678 (3d Cir. 2000); *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991)), because nothing in the Eleventh Circuit's opinion conflicts with those decisions. Courts that have held such claims preempted have based their holdings on the fact that ERISA § 510, which is enforceable through § 502(a), expressly creates a remedy for retaliation and other actions based on "benefits-defeating" motives; thus, they reason, a similar state-law retaliation claim "falls within Section 510" and "is necessarily within Section 502." *See Wood*, 207 F.3d at 677; *see also Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133, 144-45 (1990) (hold-

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[4] Petitioners also contend that the Seventh Circuit in *Jass* held that complete preemption is available only for claims that require an interpretation of an ERISA plan. Pet. 12 (citing *Jass*, 88 F.3d at 1487). That appears to be an exaggeration of the cited portion of the *Jass* opinion, but even if it were not, it does not support a grant of certiorari here, since the Eleventh Circuit held no such thing.

ing that § 502(a) provides exclusive remedy for rights guaranteed under § 510). Mr. Ervast's complaint did not involve any such claim, and the Eleventh Circuit was not called upon to, and did not, express any view on whether claims of wrongful discharge based on benefits-defeating motives were completely preempted.[5]

C. The Eleventh Circuit Did Not Limit Complete Preemption to Claims Within the Scope of Subpart (a)(1)(B) of ERISA § 502.

Petitioners also ask this Court to use this case to determine whether ERISA complete preemption is limited to claims within the scope of ERISA § 502(a)(1)(B) or whether it extends to other subparts of § 502(a) as well, as other courts of appeals have held. But this case is not the one in which to resolve that issue (assuming it needs resolving) because the Eleventh Circuit did not address it, far less decide it in conflict with the decisions of other courts of appeals. Resolution of the issue by this Court can await the day when some court of appeals actually addresses it and decides it differently from the cases petitioners cite.

Unable to point to any statement in the Eleventh Circuit's opinion limiting complete preemption to § 502(a)(1)(B), petitioners simply speculate that the Eleventh Circuit must have "assumed" that complete preemption applied only to § 502(a)(1)(B). Pet. 12. They base their speculation on the fact that the Eleventh Circuit *did not address* complete preemption under any other subpart of § 502(a), even though, they say, it *should* have. Pet. 13. They then assert that by failing to address the issue, the Eleventh Circuit somehow "ex-

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[5] Petitioners' assertion that there is a conflict with the Sixth Circuit's decision in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), is even more mystifying, because the Sixth Circuit expressly characterized the claims there as involving the placement of state-law labels on claims for "recovery of benefits." 170 F.3d at 614.

pressly limited" (Pet. 13) complete preemption to claims within the scope of § 502(a)(1)(B).

Of course, *not addressing* whether complete preemption is available under other subparts of § 502(a) is not the same thing as "expressly limiting" complete preemption to subpart (a)(1)(B). Petitioners' real complaint is not that the Eleventh Circuit *decided* an issue in conflict with the decisions of other circuits, but that it *didn't reach* an issue they think it should have resolved. Moreover, the Eleventh Circuit's silence on the issue in this case can hardly be taken as an indication that it thinks complete preemption is limited to § 502(a)(1)(B), given that another recent opinion of the same court, *Land v. CIGNA Healthcare of Florida*, 339 F.3d 1286 (11th Cir. 2003), *pet. for cert. pending*, No. 03-649, analyzed ERISA complete preemption not only under § 502(a)(1)(B) but also under § 502(a)(2).

Thus, the Eleventh Circuit's exclusive focus on § 502(a)(1)(B) in this case suggests no more than that the panel understood that that was the only issue before it. And the panel presumably had that understanding because *that was the only basis petitioners asserted in their brief for complete preemption*. Specifically, petitioners' principal brief argued that Mr. Ervast's claim was "'akin' to a claim for benefits under § 1132(a)(1)(B)," App. Br. 17, but never asserted that it was akin to a claim under any other subpart of § 502(a). The Eleventh Circuit panel cannot be faulted for failing to address an argument petitioners did not make in their brief and, indeed, tacitly discarded.

Even if there were a basis for contending that the Eleventh Circuit somehow should have divined that petitioners wanted it to consider complete preemption under subparts of § 502(a) that they neglected to cite, such an argument would not merit this Court's review. This Court does not sit to police determinations by the courts of appeals about what issues need to be addressed in their opinions.

D. Petitioners' Semantic Disagreement with the Eleventh Circuit's Use of the Words "Akin to" Presents No Issue Worthy of Review.

Objecting to the Eleventh Circuit's use of the term "akin to" to describe those state-law claims that are subject to complete preemption under ERISA, petitioners request this Court to grant certiorari to determine whether complete preemption is limited to claims "analogous" to claims under § 502(a). Petitioners contend that any such limitation is inconsistent with *Metropolitan Life*'s holding that claims "within the scope of" § 502(a) are completely preempted.

Once again, petitioners seek review of an issue they never raised below. Both in their brief on the merits and their petition for rehearing en banc, petitioners consistently asserted that Mr. Ervast's claim was "akin to" a claim under § 502(a), and never once even suggested that this was not the proper inquiry. Appellees' Br. 16-17; Pet. for Reh. and Reh. En Banc 7.

Even if petitioners had preserved this issue for review, their argument that there is a split in authority meriting review is not only purely semantic, but also extremely unpersuasive. Petitioners do not explain what the difference is between "akin to," "analogous to," and "within the scope of," or how any possible difference would be outcome determinative in this case. Indeed, if anything, "akin to" and "analogous to" would seem to be *broader* terms than "within the scope of," and it is simply nonsensical to assert that a claim could be "within the scope of" the remedies provided by § 502(a) without being analogous or akin to those remedies in some way. Similarly, the Eleventh Circuit's focus on whether a state-law claim is "akin to" a § 502(a) claim is fully consistent with this Court's latest exploration of the standard in *Davila*, which examines whether a state cause of action "duplicates, supplements, or supplants the ERISA civil enforcement remedy." *Davila*. slip op. at 6.

Petitioners further assert that the Eleventh Circuit's "akin to" test is inconsistent with decisions holding that claims of wrongful or retaliatory discharge to avoid payment of plan benefits are completely preempted. Pet. 14 (citing *Metropolitan Life*, *Wood*, and *Felton*). According to petitioners, such claims are "not analogous to any causes of action provided for in § 502(a)." Pet. 14. That is flatly wrong. As the Third Circuit explained in *Wood*, ERISA § 510 *expressly* provides that discharges to avoid payments of benefits are actionable under § 502(a). 207 F.3d at 677; *see also Ingersoll-Rand*, 498 U.S. at 144-45. Thus, plan-related wrongful discharge claims are *directly analogous* to causes of action provided for by § 502(a). The wrongful discharge cases cited by petitioners thus support the Eleventh Circuit's "akin to" standard.[6]

E. The Eleventh Circuit Did Not Hold That the Actual Existence of an ERISA Remedy Is a Prerequisite to Complete Preemption.

Petitioners assert that the Eleventh Circuit held in this case that complete preemption is available under ERISA only when the plaintiffs' claim, if asserted under ERISA rather than under state law, would be meritorious. This "holding" they assert, is contrary to decisions of other circuits holding that a state-law claim may be displaced under the complete preemption doctrine even when the relief the plaintiff seeks is not available under ERISA or his claim is otherwise not cognizable under ERISA. *See, e.g.*, *Wood v. Prudential*, 207 F.3d at 678-79; *Cicio v. Does*, 321 F.3d at 94.

The problem with petitioners' argument is, once again, that it relies on a "holding" nowhere to be found in the Elev-

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[6] Petitioners also contend that even if "akin to" is the correct test, the Eleventh Circuit misapplied it. The Eleventh Circuit's persuasive opinion is refutation enough of that argument, and error in applying a correct legal standard to particular facts is in any event not a ground for issuance of a writ of certiorari. S. Ct. R. 10.

enth Circuit's opinion. Petitioners rely solely on the Eleventh Circuit's passing observation that it was "telling" that ERISA did not require plan administrators to make disclosures of the type Mr. Ervast complained that the defendants had not provided. 346 F.3d. at 1015 n.8. That is far cry from a holding that the availability of an ERISA remedy is in all cases a prerequisite to complete preemption. Rather, the court's observation appears to be simply one factor in its overall determination that the nature of Mr. Ervast's claims is such that they are not "within the scope" of ERISA § 502 — and a relatively minor factor at that, given that the court relegated it to a footnote. If the court had actually intended to hold that complete preemption was foreclosed because Mr. Ervast would not have had a meritorious claim under ERISA, one would expect it would have said so. Given that the court did not say so, its decision does not present a "conflict" with the decisions petitioners cite on this point.

III. This Case Does Not Present the Question Whether ERISA Imposes Affirmative Disclosure Duties.

In a final, desperate bid for this Court's attention, petitioners ask the Court "to determine whether there is an affirmative fiduciary disclosure duty under ERISA." Pet. 18. The Court should not, and indeed cannot, do so, because that question is not determinative of any issue in this case and was not decided below.

Petitioners' assertion that this case poses the issue is based entirely on a sentence in footnote 10 of the Eleventh Circuit's opinion: "Although we conclude that the particular type of 'failure-to-inform' claim asserted by Ervast here sounds in state law and is not preempted, we *note*, however, that an ERISA participant has a right to information and that a failure-to-inform claim *may* lie against an ERISA administrator." 346 F.3d at 1016 n.10 (emphasis added). Petitioners assert that whether such a claim is viable under ERISA is an issue on which this Court previously reserved decision and over which "the circuits are deeply divided." Pet. 19.

Whether the circuits are "deeply divided" or not, this case cannot resolve their division, because the Eleventh Circuit's passing observation in its footnote was no more than *obiter dictum*. The comment obviously did not resolve any issue in this case because, as the Eleventh Circuit noted, Mr. Ervast was not asserting a failure-to-inform claim under ERISA. Thus, whether such a claim was available under ERISA was not before the court. Moreover, the court did not even purport to say definitively that an affirmative-duty-to-disclose claim *would* ever lie against an ERISA administrator, let alone define the circumstances under which it would. Rather, the court merely alluded in passing to the *possibility* that such a claim "may lie."

Black's Law Dictionary's definition of "*obiter dictum*" almost seems to have been written with the Eleventh Circuit's footnote in mind: "A remark made, or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument." *Black's Law Dictionary* 967 (5th ed. 1979).

Although it might go without saying that this Court does not use its certiorari jurisdiction to review dicta in the footnotes of court of appeals opinions, this Court in fact recently said so: "We sit, after all, not to correct errors in dicta; '[t]his Court reviews judgments, not statements in opinions.'" *Bunting v. Mellen*, 124 S. Ct. 1750, 1754 (2004) (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam)). Petitioners' quibbles with the Eleventh Circuit's dicta present no issue meriting this Court's attention.

IV. This Court's Decision in *Davila* Obviates Any Need for Further Guidance on Complete Preemption at This Time.

Finally, in light of this Court's recent decision in *Davila*, any suggestion that this Court should grant certiorari in an ERISA complete preemption case simply to provide further guidance on general doctrinal questions concerning the scope of the complete preemption doctrine is wholly meritless. The Court has just restated and applied the doctrine, offering new guidance on its scope that will undoubtedly assist the lower federal courts as they seek to apply it to different types of claims. Until conflicts among the circuits develop in light of *Davila*, this Court need not devote further time and attention to supplying direction to the federal courts in this area.

At the same time, nothing in the Court's decision in *Davila* remotely suggests any need to grant certiorari, vacate the judgment below and remand this case for further consideration. As noted above (*supra* at 15), the Court's articulation of the standard for complete preemption in *Davila* is fully consistent with that of the Eleventh Circuit below. Moreover, like the Eleventh Circuit below, this Court in *Davila* centered its complete preemption inquiry on two principal factors: whether the plaintiffs' claim sought benefits to which they were entitled "only because of the terms of an ERISA-regulated employee benefit plan," and whether the state-law claim seeks to enforce a "legal duty ... independent of ERISA or the plan terms." *Davila*, slip op. at 8. In *Davila*, this Court found preemption largely because the plaintiffs "complain[ed] only about denials of coverage promised under the terms of ERISA-regulated employee benefit plans," *id.* at 9, and thus their claims necessarily required interpretation of the terms of the plans. *Id.* at 10-11. In addition, the Court stressed that the relationship between the plaintiffs and defendants, and thus the only possible source of any duty, "exist[ed] here only because of [defendants'] administration of ERISA-regulated benefit plans." *Id.* at 11. Thus, the Court

found complete preemption because the plaintiffs had brought suit "only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA." *Id.* at 11-12.

Here, by contrast, as the Eleventh Circuit carefully explained, Mr. Ervast did *not* seek to rectify a wrongful denial of benefits under the plan, his claims did *not* require interpretation of the plan, and he did *not* seek to remedy violations of duties that existed by reason of the defendants' role with relation to an ERISA plan. Unlike in *Davila*, Mr. Ervast's claims require no construction of the plan, but only a mathematical valuation of interests he acquired through the plan. Moreover, in *Davila*'s terms, Mr. Ervast's claims are premised on duties that "arise independently of ERISA [and] the plan terms." *Davila*, slip op. at 10. The Eleventh Circuit's holding that Mr. Ervast's claims are not completely preempted is thus fully consistent with the principles laid down in *Davila*. Moreover, the particular issue in *Davila* — whether claims challenging medical coverage decisions are subject to complete preemption — is so different from the claim of breach of duty by a majority shareholder that is at issue in this case that the Court's disposition of *Davila* will have no conceivable effect on the Eleventh Circuit's confidence that the outcome it previously reached in this case was correct. Thus, the Court's determination with respect to complete preemption in *Davila* is not even arguably controlling here.

Moreover, the Eleventh Circuit's decision in this case contains none of the flaws this Court observed in the Fifth Circuit opinions at issue in *Davila*. The Eleventh Circuit did not, for example, hold that Mr. Ervast's claims escaped preemption merely because they were labeled tort claims as opposed to contract claims. *Cf. Davila*, slip op. at 12. Nor did the Eleventh Circuit hold that complete preemption is limited to cases where state remedies "duplicate" ERISA remedies. *Cf. id.* at 12-13. And, unlike in *Davila*, the state-law duty of

majority shareholders to minority shareholders that Mr. Ervast seeks to enforce is truly "external" to his rights under an ERISA plan. *Cf. id.* at 13.

In sum, *Davila*'s holding that a cause of action "brought to remedy only the denial of benefits under ERISA-regulated benefit plans" is subject to complete preemption (*Davila*, slip op. at 19), confirms the appropriateness of the Eleventh Circuit's analysis of the factbound issue in this case. In light of the new guidance the Court has just provided to lower courts facing ERISA complete preemption issues generally, and the absence of any genuine conflict either on the specific issue posed by this case or the broader questions that petitioners incorrectly claim it implicates, there is no reason for this Court to hear the merits of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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